(10) (9)

No. 86-179 and 86-401

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, and THE UNITED STATES OF AMERICA,
Appellants,

vs.

CHRISTINE J. AMOS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Did the court below err in holding that the First Amendment prohibits Congress from permitting religious organizations to discriminate on the basis of religion in hiring individuals to perform work connected with activities that a secular authority might consider "non-religious"?

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BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

Pursuant to Rule 36.2 of the Rules of this Court, the organization named above files this brief in support of

Appellants. Consent for the filing of this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These constituent bodies

have a total membership of approximately 30 million and reflect the traditional Baptist concern for proper church-state relations. As part of their religious mission, these bodies operate and maintain colleges, universities, seminaries, and other agencies that will be affected by the Court's decision in this case.

The Baptist Joint Committee on Public Affairs has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ."

Among Baptists, religious liberty is a fundamental and sacred principle. Baptists are deeply committed to the principle of non-establishment, or church-state separation, as the institutional guarantor of this liberty. The Baptist commitment to non-establishment was evidenced by their enthusiastic

support for both the Virginia Act for Establishing Religious Freedom and the First Amendment. [illegible] A. Stokes and L. Pfeffer, Church and State in the United States 62-63, 203-204 (1964). Indeed, it is not overstatement to suggest that without the efforts of Baptists there would be no provision for church-state separation in the Constitution. See J. Dawson, Baptists and the American Republic 117 (1956).

Because of its commitment to religious freedom for all citizens, the Baptist Joint Committee throughout the years has opposed governmental efforts to breach the wall of separation between church and state by aiding or advancing the cause of religion. At the same time the Committee has been zealous in its defense of church autonomy and the free exercise of religion.

The Baptist Joint Committee believes

that the principle of religious liberty as embodied in the First Amendment to the Constitution of the United States has been seriously damaged by the decision of the United States District Court for the District of Utah. The court has misinterpreted the establishment clause so as to jeopardize the autonomy of religious organizations and the healthy separation of church and state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I, provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), provides that it shall be unlawful for an employer:

> (1)to fail or refuse to hire or to discharge any individual, or other-

wise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 702 of the Civil Rights Act of 1964 (unamended), formerly codified at 42 U.S.C. §2000e-1, provided:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its religious activities.

The 1972 amendment to Section 702, codified at 42 U.S.C. §2000e-1, provides:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association, educational institution, or society with respect to the employ-

> ment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

SUMMARY OF ARGUMENT

During the Senate debate over the 1972 amendment to §702 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, one of the amendment's sponsors, Senator Ervin, cited Justice William O. Douglas, stating:

> It is impossible to separate the religious and non-religious aspects of a religious corporation. 118 Cong.Rec. 1973 (Feb. 1, 1972).

Heeding the admonition of Senator Ervin, Congress deleted the portion of §702 that had assigned to government the impossible task referred to by Justice Douglas. The sole purpose for Congress' action was to disentangle government from the internal affairs of religious

organizations. 118 Cong.Rec. 946-949, 4503 (1972).

The primary effect of §702 as amended is not the advancement of religion but rather the strengthening of the wall of separation between church and state. Similarly, the amendment serves to prevent excessive government entanglement with religion.

Congress' action in amending Title VII is in complete harmony with this Court's interpretations of the religion clauses of the First Amendment. Therefore, the judgment of the District Court should be reversed.

ARGUMENT

The court below erred in holding that the First Amendment prohibits Congress from permitting religious organizations to discriminate on the basis of religion

in hiring individuals to perform work connected with activities that a secular authority might consider "non-religious." While the lower court properly identified the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971),[1] as the appropriate criterion for evaluating this case, the court's application of the test was erroneous.

A. SECULAR PURPOSE.

As originally adopted, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, exempted religious organizations from its prohibitions against religious discrimination in employment with respect to the organization's "religious

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[1]The Court held in Lemon, supra, at 612-613, that in order to pass muster under the establishment clause, a statute (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive entanglement between government and religion.

activities." Congress amended the Act in 1972 by striking the word "religious," thereby broadening the exemption to cover activities that a secular authority might consider "non-religious."

The legislative history of the 1972 amendment clearly demonstrates that a legitimate secular purpose existed for its adoption. That secular purpose was to avoid governmental interference and entanglement with religion. 118 Cong. Rec. 946-949, 4503 (1972).

The original Act had put the government in the untenable position of examining and evaluating the beliefs and practices of religious organizations for the purpose of determining which of their activities were "religious." It took Congress eight years to recognize that government was wholly incompetent to make such determinations and that any attempt to define the church's religious mission

was constitutionally problematic. The 1972 amendment resolved this problem by deferring to the religious organizations themselves to define the nature and scope of their religious mission.

The District Court recognized the secular purpose for the 1972 amendment stating, "The legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose. Furthermore, there is no indication that Congress amended §702 for a religious purpose or to promote religion or religious beliefs." Amos v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F.Supp. 791, 812 (D.Utah 1984) [hereinafter cited as Amos I].

B. PRIMARY EFFECT.

The District Court held that "the direct and immediate effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution." Amos I, supra, at 828.

The District Court is mistaken.

The establishment clause was adopted to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668 (1970). This great clause secures the separation of church and state which is the institutional guarantor of our religious liberty.

On the basis of the establishment clause, the Court has struck down

numerous attempts by government to breach the wall of separation by aiding or advancing the cause of religion. E.g., Grand Rapids School District v. Ball, _____ U.S. _____, 105 S.Ct. 3216 (1985); Wallace v. Jaffree, _____ U.S. _____, 105 S.Ct. 2479 (1985); Stone v. Graham, 449 U.S. 39 (1980). Notwithstanding, it is well established that not every law that confers an "indirect," "incidental," or "remote" benefit upon religion is unconstitutional. Committee for Public Education v. Nyquist, 413 U.S. 756, 771 (1973), citing Everson v. Board of Education, 330 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420, 450 (1961); Walz, supra, at 671-672, 674-675; see also Witters v. Washington Department of Services for the Blind, _____ U.S. _____, 106 S.Ct. 748 (1986). In order to violate the establishment clause, an otherwise valid law must have the "primary effect"

of advancing or inhibiting religion. Lemon, supra, at 612.

In keeping with these principles, the Court has upheld numerous laws that confer indirect or incidental benefits upon religion. Witters, supra; Everson, supra; Board of Education v. Allen, 392 U.S. 236 (1968). More importantly, the Court has upheld statutory exemptions for religious organizations from otherwise neutral legislative acts. Property tax exemption for churches, Walz, supra, and exemptions from military service for those who object to war for religious reasons, Gillette v. U.S., 401 U.S. 437 (1971) are notable examples. The Court has indicated that other statutory exemptions expressly for religion would be permissible though not required under the First Amendment.[2] Braunfeld v. Brown,

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[2]The Court has made clear that "the limits of permissible state accommodation to religion are

366 U.S. 599, 608 (1961). At times the Court has even created its own exemption when none was expressly provided in the statute. NLRB v. Catholic Bishop, 440 U.S. 490 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972). Finally, lower federal courts have upheld similar exemptions for religious organizations.[3] See Tennessee Baptist Children's Home, Inc. v. U.S., 790 F.2d 534 (6th Cir. 1986) and Lutheran

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by no means co-extensive with the noninterference mandated by the Free Exercise Clause." Walz, supra, at 673. Thus, Congress can make certain accommodations for religion that may not be required by the First Amendment. To the extent that Congress so acts, it provides breathing space for permissible religious exercise.

[3]Appellees cite numerous cases in note 9, p. 14 of their Motion to Affirm in support of their argument that labor laws may be applied to religious employers in some instances without violating the free exercise clause. While taking issue with portions of that argument, amicus reminds the Court that the question of whether such laws can be applied to religious organizations without violating the Constitution is not before the Court in this case. The sole issue is whether Congress can exempt religious employers from coverage under §702 of the Civil Rights Act of 1964 without violating the establishment clause.

Social Services of Minnesota v. U.S., 758 F.2d 1283 (8th Cir. 1985) (applying the statutory exemption found in 26 U.S.C. §6033 for churches and their integrated auxiliaries that excuses them from filing informational tax returns).

In like fashion, a majority of states and local governments by statute or judicial decision exempt churches from prohibitions against building in neighborhoods zoned "residential." Comment, "Justice Douglas' Sanctuary: May Churches Be Excluded from Suburban Residential Areas?" 45 Ohio St. L.J. 1018 (1984). Although some courts have held that a municipality is not required to provide such an exemption by the free exercise clause, Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir.), cert. denied, ____ U.S. ____, 104 S.Ct. 72 (1983); Grosz v. City of Miami, 721 F.2d 729 (11th Cir. 1983),

amicus is aware of no decision striking down such an exemption as violative of the establishment clause.

The various exemptions cited above reveal a correct understanding on the part of many governmental agents of the proper relationship between church and state. These governmental agents have recognized that while the separation of church and state protects against governmentally established religion, it prohibits governmental interference with religion as well. Walz, supra, at 669. Exemptions that prevent governmental intrusion into religion, excessive entanglement between church and state, and conflicts with legitimate free exercise not only are consistent with these principles of non-establishment, they are essential to the institutional separation of church and state.

Some of the statutory exemptions for

religion undoubtedly confer an indirect or incidental benefit upon religion. The benefit may vary from being quite significant as in Walz to being relatively minor as in the case sub judice. However, any such benefit manifests no more than the occasional tension between the religion clauses. Thomas v. Review Board, 450 U.S. 707, 719 (1981).

Viewing the application of §702 to religious groups as a whole and not solely to the facts in this case (see Witters, supra), the exemption for religious employers does not have the primary effect of advancing religion.[4]

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[4]Citing Tony and Susan Alamo Foundation v. Secretary of Labor, _____ U.S. _____, 105 S.Ct. 1953 (1985), Appellees argue that the primary effect of §702 is to advance religion because the Mormon church is using the exemption to coerce financial support from its employees, thus giving it an unfair economic advantage over its competitors.

It is tenuous at best to assert that requiring employees to tithe, one small portion of the requirements for a temple recommend, unfairly disadvantages secular employers. First,

To the contrary, one must strain the analysis to discover any benefit at all to religion. No public support, whether financial or otherwise, has been received. No sponsorship or promotion of religion has occurred. No governmental assistance of any kind has been rendered. Congress simply has refused to force religious organizations to hire individuals who do not subscribe to their particular religious viewpoints. Such a decision on the part of Congress is not only lawful, it is laudable.[5] By eliminating

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the tithe goes to the church itself and not to a specific church agency, General Handbook of Instructions, §6, p. 1; and second, even if the tithe went directly to the agency, there is no proof that the majority of these employees would not be tithing anyway apart from the requirements of their employment contracts. In short, no nexus exists between the exemption contained in §702 and the Appellees' allegations of unfair business competition.

[5]The original Act chilled the free exercise of religion by pressuring religious organizations to hire atheists, agnostics or adherents of other faiths who were otherwise qualified for all positions that a court might conceivably consider

governmental interference in religious affairs, Congress has strengthened rather than weakened separation of church and state. The primary effect of such action no more advances religion than do this Court's decisions to refrain from extending its jurisdiction over ecclesiastical matters.

The Court has held repeatedly that the state is prohibited from examining or evaluating matters pertaining to church doctrine and administration. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 666 (13 Wall. 679) (1871).

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non-religious. Religious employers felt compelled to hire these individuals in order to avoid possible damage awards for religious discrimination.

Congress' action in amending §702 follows the principles set forth in these decisions and should withstand constitutional attack.

In finding the 1972 amendment unconstitutional, the District Court relied heavily on the fact that it was not "facially neutral." Amos I, supra, at 822-824. The court is mistaken in its excessive reliance upon the absence of facial neutrality.

Under an analysis focused upon "primary effect," facial neutrality is not controlling. Neutral statutory language is but one factor to consider in determing whether the primary effect of a statute is to advance or inhibit religion. The fact that neutrality between religious interests and non-religious interests is not mandated by the establishment clause is evidenced by numerous decisions of this and other courts. Yoder, supra;

Gillette, supra; Braunfeld, supra; McGowan v. Maryland, 366 U.S. 420 (1961); Tennessee Baptist Children's Home, supra; and Lutheran Social Services, supra.

The District Court attempts to distinguish this case from those permitting a reasonable accommodation of religion on the grounds that, unlike those cases, "the abolition of the governmental exclusion for religious organizations' religious discrimination in secular, non-religious activities does not present any conflict with the free exercise clause." Amos I, supra, at 824.

The court is flatly wrong.

Any attempt by government to examine and evaluate the doctrines and practices of religious organizations for the purpose of determining which activities are "non-religious" is fraught with both establishment and free exercise problems. As proof, one need look no

further than the test fashioned by the District Court itself to make these determinations.[6] Parts two and three of

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[6]The following test was proposed by the District Court for determining which of a religious organization's activities were "non-religious" and, therefore, subject to Title VII's prohibitions against religious discrimination in employment:

> First, the court must look at the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial connection between the activity in question and the religious organization's religious tenets or matters of church administration and the tie under the first part of the test is close, the court does not need to proceed any further and may declare the activity religious. See Feldstein v. Christian Science Monitor, 555 F.Supp. 974 (D.Mass. 1983). However, where the tie between the religious entity and activity in question is either close or remote under the first prong of the test and the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is

the court's test require an analysis of church doctrine and practice in blatant violation of the principles of church autonomy set forth in Watson v. Jones, supra, and other decisions of this Court. See Amos I, supra, at 800-802. The test entangles the state in religious matters on a potentially ongoing basis and burdens the free exercise of religion by pressuring religious employers to hire non-religious employees for any position that might conceivably be considered "non-religious". See footnote 5, supra.

While this Court might not be prepared to find that the 1972 amendment was

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performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial relationship between the employee's job and church administration or the religious organization's rituals or tenets, the court must find that the activity in question is religious. If the relationship is not substantial, the activity is not religious. Amos I, supra, at 799 (footnote omitted).

required by the First Amendment, the District Court's assertion that the unamended version of §702 presents no conflict with the free exercise clause and is therefore distinguishable from Walz and its progeny is remarkable.

C. EXCESSIVE ENTANGLEMENT.

In order to determine whether a law results in excessive government entanglement with religion, a court must "examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon, supra, at 615.

Applying these criteria to §702, it is obvious that the exemption for religious employers does not foster excessive entanglement. While the character and purpose of many of the exempt organiza-

tions are pervasively sectarian, the nature of the aid provided is that there is no aid. Congress merely has adopted a hands-off policy that allows religious organizations to discriminate on the basis of religion in their employment practices. This refusal to regulate the internal affairs of religious organizations could hardly be viewed as "aid." Similarly, there is no relationship between the government and religious authorities as a result of the 1972 amendment. Far from creating excessive entanglement, the 1972 amendment resolved the entanglement problems that had existed under the original Act. See page 10, supra.

In contrast to the entanglement problems it sees in §702 as amended, the District Court asserts that a limited exemption for "religious" activities only does not create the type of entanglement

the First Amendment seeks to prevent. Amos I, supra, at 814. Although the limited exemption preferred by the District Court does not involve precisely the same type of inspection or evaluation struck down in Lemon, the resulting entanglement is essentially the same. Any attempt to regulate the hiring practices of religious organizations in "non-religious" areas necessitates periodic and detailed evaluation of religious beliefs and practices. Church doctrine must be examined, activities inspected, and theology analyzed in the effort to isolate the "non-religious" activities of the church. The court by its own admission acknowledges this fact: "[The] definite end or purpose [of an activity] must be measured against the religious rituals or tenets of the organization or against matters of church administration." Amos v. Bishop, 618

F.Supp. 1013, 1024 (D.Utah 1985) [hereinafter cited as Amos II].

Courts and other governmental agencies must realize that the purpose of a church agency is not simply a specific task such as health care or recreation. Central to the church's religious mission is providing a corporate witness to its religious faith. That witness should extend from the director of an agency to the maintenance engineer whose Christian commitment is equally important if the church is to fulfill its religious mission. From top to bottom, it is a church agency's religious obligation to ensure that each of its employees contributes to the agency's corporate witness by embodying the teachings of the Christian faith.

As Baptists, all that we do is related in part to Christ's commandment to "Go ye therefore, and teach all nations, baptizing them in the name of the Father,

and of the Son, and of the Holy Ghost." Matthew 28:19. Any attempt by the state to force Baptist agencies to hire non-Christians or even non-Baptists diminishes our corporate witness and hampers this evangelistic task. In the words of one Baptist educator, "An atheist who scoffs at Christianity might be a competent maintenance engineer, but if he despises and scoffs at Christians and Christian values, he might defeat the mission of a Baptist college [or agency] to create a Christian atmosphere on the campus and instill and strengthen values in our students, teachers, administrators, and other employees."[7]

Turning to the facts in this case, the court had no difficulty finding an

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[7] Amicus recognizes that a separate exemption for religious schools exists under §703, 42 U.S.C. §2000e-2(e)(2), but the legality of this section becomes highly suspect, at least as it applies to colleges and universities, if §702 is struck down.

exercise program to be "non-religious" and a program for aiding the handicapped to be "religious." Amos I, supra; Amos II, supra. This sort of ad hoc evaluation of religious organizations by secular authorities illustrates the inherent problems in the approach suggested by the District Court.

Christians are admonished by the Holy Scriptures to attend to their physical health as a part of their spiritual discipline.[8] Accordingly, a vigorous program of physical exercise may be as "religious" an activity as aiding the handicapped. That the Mormons considered operating a gymnasium that offers physical exercise a religious activity is indicated by the prayer that was offered

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[8]"Know ye not that ye are the temple of God, and that the spirit of God dwelleth in you? If any man defile the temple of God, him shall God destroy; for the temple of God is holy, which temple ye are." I Cor. 3:16-17.

at the dedication of Deseret Gymnasium. Amos I, supra, at 800, n. 15.

The insurmountable problems that are created by the District Court's decision become even clearer when the court's test is applied to other church agencies. Consider the following: a mathematics teacher at a Baptist college; a stenographer at the Southern Baptist Foreign Mission Board; House Counsel at the Baptist Joint Committee; a custodian at a local church; the director of a day care center at a Baptist agency; the director of recreation at a local church; a nurse at a Baptist hospital; the controller of a church pension board; and the librarian at the American Baptist Board of National Ministries. The court might well consider all of these positions to be unrelated to the religious activities of the church, yet each and every one is integral to its religious mission. They are

all part of the unified witness of Baptists.

Turning to the facts in this case, a church-owned gymnasium would in all likelihood also be considered an integral part of a Baptist church's ministry. In fact, many Baptist churches now have ministers of recreation on their paid professional staffs. The District Court's suggestion that such activities are "non-religious" because the same facilities and services are available at a public gymnasium fails to take into account that religious organizations engage in these activities for religious purposes. The mere fact that an activity has been duplicated by secular organizations does not change its religious nature for those in the community of faith.

Viewing both the District Court's decision and 42 U.S.C. 2000e-1, it is obvious that the former rather than the

latter creates excessive governmental entanglement with religion in violation of the First Amendment.

CONCLUSION

For the above-mentioned reasons, amicus urges that the decision of the United States District Court for the District of Utah be reversed.

Respectfully submitted,

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